A

Ong Eng Hock & Anor v Ong Cheng Guan & Anor

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-104–11 OF 2016(J)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, ZAHARAH IBRAHIM, BALIA YUSOF AND JEFFREY TAN FCJJ
5 JUNE 2018

C

Evidence — Burden of proof — Forgery — Probate — Allegation that signature of deceased in probate forged — Whether burden of proof laid on person making who sought revocation — Whether will forged — Whether sufficiently proved — Whether probate ought to be revoked

D

By a will, one Ong Eng Bee ('the deceased') appointed the appellants as her executors and sole beneficiaries. When the deceased died, the High Court granted the probate to the estate of the deceased to the appellants. The first respondent alleged that the will was forged. The first respondent lodged a police report and initiated a claim at the High Court and submitted that: (a) the deceased's lawyer had summoned family members, including the appellants, and informed them there was no will; and (b) the signature on the will was not the same as the deceased's signature. The appellants denied the respondents' allegations and counterclaimed against the first respondent for damages. The High Court dismissed the respondents' claim and the appellants' counterclaim. The Court of Appeal did not disturb the High Court's findings but held that the High Court was wrong to impose the burden of proof on the first respondent to prove forgery when the appellants had not proved due execution of the will. Hence, the present appeal.

E

F

G

Held, allowing the appeal:

(1) The person who seeks revocation of the probate or letters of administration has the burden to prove sufficient cause. In this case, forgery was pleaded as the sufficient cause. Due execution was not an issue. The High Court held that forgery was not proved. Since sufficient cause was not established, the Court of Appeal could not revoke the probate. The order of the High Court was restored (see paras 20–22).

H

I

[Bahasa Malaysia summary

Melalui satu wasiat, seorang bernama Ong Eng Bee ('si mati') melantik perayu-perayu sebagai pelaksana dan penerima waris tunggal. Apabila si mati meninggal dunia, Mahkamah Tinggi memberi probet harta pusaka si mati kepada perayu-perayu. Responden pertama mendakwa bahawa wasiat tersebut

dipalsukan. Responden pertama membuat laporan polis dan memulakan tuntutan di Mahkamah Tinggi dan menghujahkan bahawa: (a) peguam si mati telah memanggil anggota keluarga, termasuk perayu-perayu, dan memaklumkan mereka bahawa tiada wasiat; dan (b) tandatangan pada wasiat itu tidak sama dengan tandatangan si mati. Perayu-perayu menafikan tuduhan responden dan menuntut balas terhadap responden pertama bagi ganti rugi. Mahkamah Tinggi menolak tuntutan responden-responden dan tuntutan balas perayu-perayu. Mahkamah Rayuan tidak mengganggu dapatan Mahkamah Tinggi tetapi berpendapat bahawa Mahkamah Tinggi terkhilaf apabila mengenakan beban bukti pada responden pertama untuk membuktikan pemalsuan sedangkan perayu-perayu tidak membuktikan pelaksanaan wajar wasiat tersebut. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Pihak yang berkehendakkan pembatalan probet atau surat pentadbiran mempunyai beban membuktikan kausa yang mencukupi. Dalam kes ini, pemalsuan telah dikemukakan sebagai kausa yang mencukupi. Pelaksanaan wajar tidak menjadi isu. Mahkamah Tinggi berpendapat bahawa pemalsuan tidak dibuktikan. Oleh kerana kausa yang mencukupi tidak terbukti, Mahkamah Rayuan tidak boleh membatalkan probet tersebut. Perintah Mahkamah Tinggi dikembalikan (lihat perenggan 20–22).]

Notes

For cases on burden of proof in general, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 670–1054.

Cases referred to

Canagasaby v Saravenamuttoo Vytilingam [1917] 2 FMSLR 185 (refd)
Carlisle v Wills [1963] VR 583; [1963] VicRp 78, SC (refd)
Fazil Rahman & Ors v AR S Nachiappa Chettiar [1963] 1 MLJ 309 (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Gardiner v Hughes [2017] VSCA 167, CA (refd)
Hill v Rowan BC201704654, SC (refd)
In the estate of Syed Abdullah bin Abdulrahman bin Sahil, deceased [1939] 1 MLJ 179 (refd)
Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal [2005] 6 MLJ 540; [2005] 3 CLJ 753, CA (refd)
Khoo Boo Gong, decd Khoo Teng Seong v Teoh Chooi Ghim & Ors, Re [1981] 2 MLJ 68, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Ligar Fernandez v Eric Claude Cooke [2002] 5 MLJ 177, HC (refd)

Rm P Rm P V Palaniyappan v NPL St MV Ramanathan Chettiar [1977] 2 MLJ 34 (refd)
Tan Khay Seng v Tan Kay Choon & Anor [1990] 1 MLJ 51, HC (refd)
Watson, Re [2017] VSC 322, SC (refd)
Will of Littlewood (dec'd), Re The BC9406289, SC (refd)

Legislation referred to

Probate and Administration Act 1959 s 34
Rules of Court 2012 O 72 r 13
Succession Act 1925 [IND] s 263
Wills Act 1959 s 5(1)

Cyrus Das (Joshua Kevin, Azura Adnan and Savreena Kaur with him) (Kevin & Co) for the appellants.
Rosli Kamaruddin (Muhammad Naufal Amran, Muhammad Fahmi Jamil and Khairulazwad Sariman with him) (Rosli Kamaruddin & Co) for the respondents.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] On 27 July 2017, we heard and unanimously allowed this appeal. We set aside the order of the Court of Appeal dated 19 February 2016 and restored the order of the trial court dated 7 January 2013. We now give our reasons.

[2] By will dated 18 February 2000, Ong Eng Bee ('the deceased') appointed her son ('the first appellant') and grandson ('the second appellant') as her executors and named the appellants as her sole beneficiaries. The deceased died on 7 March 2000. On 15 February 2002, the High Court at Muar granted probate to the estate of the deceased to the appellants.

[3] The first respondent, a grandson of the deceased from another son ('PW5'), alleged that the will was a forgery. In Johor Bahru High Court Civil Suit 22–765 of 2007 ('probate action'), the first respondent sought: (i) a declaration that the will of the deceased was null and void; (ii) an order to set aside the probate granted to the appellants; and (iii) an order to set aside all transfers of assets pursuant to the will. In his statement of claim, the first respondent pleaded: (i) that members of the family of the deceased, including the appellants, were summoned and then informed by one Tan Kiah Teck of Messrs Tan & Tan, Johor Bahru, who was the lawyer for the deceased whilst alive, that the deceased left no will; (ii) that the true signature of the deceased was not the same as the purported signature of the deceased on the will; and (iii) that the first respondent had lodged police reports on the forgery of the will. The second respondent, who was the tenant of three plots of land bequeathed to the appellants under the will, was not a party in the probate

action and did not participate in the instant appeal. A

[4] In their statement defence, the appellants denied that members of the family of the deceased, including the appellants, were informed by the said Tan Kian Teck that the deceased left no will. The appellants further pleaded: (i) that the will was a valid will witnessed by witnesses; (ii) that it was within the first respondent's knowledge that the deceased had different signatures; and (iii) that, the police had not taken any action against the appellants on the alleged forgery. And for good measure, the appellants counterclaimed against the first respondent for damages, for the malicious reports lodged by the first respondent against the appellants. B C

[5] Insofar as the trial court was concerned, 'the main and core issue for determination ... was whether the signature (of the deceased) was genuine or forged. In order to succeed in his claim, ('the first respondent') had to discharge the burden of proving that the will was a forgery according to the standard of proof'. At paras [10] and [12] of its judgment, the trial court repeated that the core dispute was whether the appellants 'falsified the signature of the deceased' as contended by the first respondent or whether 'the will was valid' as contended the appellants. The trial court remarked that the first respondent had the 'legal and evidential burden of proof', and that the appellants had no 'evidential burden' unless 'a prima facie case (had been) made out on the pleaded cause of action'. D E

[6] Both the first respondent and the appellants summoned handwriting 'experts' (PW4 from Singapore for the first respondent, and DW3 from Australia for the appellants) to testify on the impugned signature. PW4 concluded in his report and testified that the will was forged, while DW3 concluded in his report and testified that the impugned signature was that of the deceased. After a detailed analysis and evaluation of the opposing opinions of the 'experts' coupled with an assessment of the expertise and experience of the 'experts' (see paras [13]–[14] and [20]–[26] of the judgment of the trial court), the trial court held that 'the expert opinion of DW3 ... was to be preferred to that of PW4', for the following reasons: F G H

(a) the credentials and training of DW3 surpassed that of PW4; the experience of DW3 was wider; the exposure of DW3 in the field of document examination was greater;

(b) DW3 testified that his expert evidence had been accepted by the High Court of Sabah and Sarawak in three civil suits; PW4 merely listed his court appearances without any disclosure on the specifics of his testimony or whether his testimony had been accepted; I

(c) in the preparation of his report, PW4 only examined a photocopy of the will; that impaired PW4's examination, a fact that PW4 readily admitted in his report;

(d) PW4's subsequent examination of the original will was conducted in the premises of the court; PW4's subsequent report was a reproduction of the original report, except for the deletion of the admission in para [6](c) above; that raised the question as to whether PW4 'had in fact conducted a proper and thorough comparison of the original Will with the specimen signatures or merely a cursory examination of about two and a half hours to confirm the validity of (his earlier) conclusion';

(e) PW4's report was vague and inconclusive; based on inconsistencies in certain features of the impugned signature, PW4 concluded that the impugned signature was not that of the deceased;

(f) DW3 explained how those inconsistencies could have come about:

> the apparent discrepancies of one more stroke used to write the character, as mentioned in the Report of William Pang, could reasonably be attributed to the typical outcomes which are known to result in signatures from the infirmed hands of the elderly: specifically the tendency towards more pen-stops or pen-lifts with clumsy restarting pen-placement, (resulting in the unintended perception of one more line — stroke in certain characters), the poorer line quality, writing-speed and fluency, the difficulty in completing some complex handwriting formations and characteristics, and a greater likelihood or more blunt-line-endings ... I came to the conclusion that due to the numerous observed similarities, there is strong support for the proposition that this questioned signature was signed by the same elderly writer as those Ong Eng Bee specimen signatures.

(g) PW4 'did not sufficiently explained with cogent data how he reconciled the inconsistencies with the similarities found in arriving at the conclusion that the (impugned) signature ... was not written by the (deceased)'.

[7] The trial court thus summed up its reasons for its preference of DW3's expert opinion:

> DW3 thoroughly analysed and examined both the similarities and inconsistencies between the original and specimens before he expressed his opinion that the signature was genuine. In my view, he (DW3) supported his conclusion, that the (impugned) signature was signed by (the deceased) who had written the specimens, by cogent data as a result of a comprehensive analysis of the signatures, duly taking into consideration both the similarities and the differences that were observed. In these circumstances, I held that the expert opinion of DW3 was to be preferred to that of PW4.

(see para [26] of the judgment of the trial court).

> In short, his (DW3) conclusion of genuineness was firm, unequivocal and supported by cogent data based on a comprehensive examination that left little room for doubt. PW4 on the other hand had not done a thorough analysis with the original Will and arrived at findings and conclusions that were weak, inconclusive and unreliable as proof ...

(see para [29] of the judgment of the trial court).

[8] That core finding aside, the trial court also made the following findings, which were all against or not for the first respondent:

(a) the first respondent pleaded but failed to call Tan Kian Teck to testify as contended;

(b) the first respondent contested the will and alleged that it was invalid on the ground of forgery; but the first respondent should call the witnesses to the will to testify;

(c) the evidence pointed to the fact that before his demise the deceased lived with the second appellant and not with PW5 as contended by the first respondent;

(d) the appellants produced evidence that the deceased gave company shares and lands to other members of the family;

(e) there was a history of enmity and hostility between PW5 and the appellants; and

(f) none of the surviving wives or children of the deceased, a total of 11 persons excluding PW5, challenged the will.

[9] Both claim and counter claim were dismissed by the trial court.

[10] The respondent appealed to the Court of Appeal who did not disturb any finding of fact of the trial court. However, the Court of Appeal disagreed with the trial court on the burden of proof. The Court of Appeal held that the trial court was wrong to impose the burden of proof on the first respondent to prove forgery when the appellants had not proved due execution of the will. At paras [4]–[6] of its judgment, the Court of Appeal held that the appellants, as propounders of the will, had the burden to prove due execution and the absence of suspicious circumstances surrounding the making of the will. The Court of Appeal referred to *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal* [2005] 6 MLJ 540; [2005] 3 CLJ 753, *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, *Sarkar on Evidence* (14th Ed) Vol 2 at p 1396, and cited s 5(1) of the Wills Act 1959 which provides that 'no will shall be valid unless it

A is in writing and executed in manner hereinafter mentioned'. The Court of Appeal reasoned that since the appellants did not called the witnesses to the will to testify in the probate action, 'the will was not worth the paper it was written on'. The Court of Appeal reversed the decision of the trial court and revoked the probate.

B

[11] The appellants obtained leave to appeal to this court on the following questions of law:

(a) whether the probate rule that the burden of proving that the instrument
C so propounded is the last will and testament of the testator applies in a case where the impugned will has already been admitted into probate and a sealed grant of probate issued by the High Court? and

(b) where the challenge to the impugned will is on grounds of forgery, and
D specifically that the executor had forged the will, whether the burden lies entirely on the challenger in proving forgery?

[12] For the appellants, it was orally submitted: (i) the Court of Appeal misunderstood the case before it; (ii) it was an action for revocation of the
E probate and not an action for grant of probate; (iii) the only issue was whether a false will was put forward to obtain probate; (iv) the grant of probate, even in common form, is conclusive as to due execution (learned counsel cited *Williams, Mortimer and Sannucks on Executors, Administrators and Probate* (20th Ed) at 40-02); and (v) s 34 of the Probate and Administration Act 1959
F should be read together with O 72 r 13 of the Rules of Court 2012. For the first respondent, it was orally submitted: (i) rules of probate were not applicable to the case; (ii) when the will was challenged, the onus shifted to the propounders of the will; (iii) the grant of probate was immaterial; and (iv) there was no will in existence.

G

[13] We agree that 'those who propound a will must show that the will of which probate is sought is the will of the testator ... has to prove its due execution and valid execution and if there are any suspicious circumstances ... remove them from the mind of the court ...' (*Sarkar on Evidence* (14th Ed) Vol 2 at p 1396). That is so where probate is being sought. But probate was not
H sought in the instant case. The will had been propounded. Probate had been granted. After it had been probated, the will was challenged. But yet what was before the trial court was not an action for the grant of probate, but an action for revocation of the probate.

I

[14] Section 34 of the Probate and Administration Act 1959 (Revised 1972) provides that 'any probate or letters of administration may be revoked or amended for any sufficient cause'. '... the Probate and Administration Act 1959 has no definition of what is sufficient cause. What constitutes sufficient cause

would depend on the circumstances of each case. Section 263 of the Indian Succession Act 1925 provides a useful guide as to what is sufficient cause …' (*The Law of Wills Probate Administration and Succession in Malaysia and Singapore* by Mahinder Singh Sidhu at p 219). But regardless of what actually constitutes sufficient cause, it is implicit that any probate or letters of administration may only be revoked or amended for sufficient cause. Probate or letters of administration may not be revoked or amended without sufficient cause. It should go without saying that unless there is sufficient cause, an action for revocation of probate or letters of administration must fail. But who has the burden to show sufficient cause — applicant or respondent?

[15] In the instant case, the Court of Appeal held: (i) that the trial court was wrong to impose the burden of proof on the first respondent to prove forgery when the appellants had not proved due execution of the will; (ii) that the appellants, as propounders of the will, had the burden to prove due execution and the absence of suspicious circumstances surrounding the making of the will; and (iii) that since the appellants had not called the witnesses to the will to testify in the probate action 'the will was not worth the paper it was written on'. But really, what the Court of Appeal had actually done, in those latter rulings, was to treat the instant probate action as if it were an action for the grant of probate, that evident by the Court of Appeal's reliance on *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors* and *Gan Yook Chin v Lee Ing Chin* which were contentious probate proceedings where probate was being sought, when in fact and in law it was not. As said, the will had been propounded and probate had been granted. The instant probate action was for revocation of the probate. The over-arching matter of inquiry was whether there was sufficient cause for revocation of the probate. But that, with respect, was not appreciated by the Court of Appeal who held that the burden and initial onus of proof lay with the appellants, notwithstanding the fact that the first respondent was the pursuer who brought the instant probate action for revocation of the probate.

[16] The startling effect of that latter ruling by the Court of Appeal is that a person who seeks revocation of the probate has no burden or initial onus to prove sufficient cause. The will might have been probated. But the stand of the Court of Appeal was that in an action for revocation of the probate, a respondent has the burden to prove the probated will all over again, while an applicant has no burden or initial onus to prove sufficient cause. To say the least, we were completely taken aback by that stand of the Court of Appeal. For it has been settled by a long line of authorities that the person who seeks revocation of the probate or letters of administration has the burden to prove sufficient cause.

[17] *In the estate of Syed Abdullah bin Abdulrahman bin Sahil, deceased* [1939] 1 MLJ 179, *Canagasaby v Saravenamuttoo Vytilingam* [1917] 2 FMSLR

185, and *Fazil Rahman & Ors v AR S Nachiappa Chettiar* [1963] 1 MLJ 309 did not expressly say so. But in *Rm P Rm P V Palaniyappan v NPL St MV Ramanathan Chettiar* [1977] 2 MLJ 34, Abdul Hamid J, as he then was, categorically stated that the applicant has the onus to establish sufficient cause:

> Before I finally state my finding, it may be useful to refer to the law affecting application for revocation of probate. It is settled law that the court may revoke any probate if it is satisfied that there is sufficient cause to do so (s 34 of the Ordinance). The onus, I think, is on the applicant to establish that there is sufficient cause for the revocation. What constitutes sufficient cause would, to my mind, depend upon the circumstances of each particular case.

[18] In *Re Khoo Boo Gong, decd Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68, Chang Min Tat FJ, delivering the judgment of the court, also openly stated that the applicant has the onus to make out sufficient cause for revocation of the probate:

> In our view, therefore and with respect, we do not think that the respondents have made out a case for the revocation of the probate granted to the appellant. No sufficient cause has been shown by the respondents. The appeal must be allowed.

[19] And in the following cases, *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177, and *Tan Khay Seng v Tan Kay Choon & Anor* [1990] 1 MLJ 51, the action for revocation of the probate or letters of administration was dismissed by reason of the applicant's failure to establish sufficient cause.

[20] It is clear that the person who seeks revocation of the probate has the burden and initial onus to prove sufficient cause. In Victoria, Australia, where sufficient cause is not specified in the equipollent provision, the court requires the applicant to show a prima facie case (see for example, *Re Watson* [2017] VSC 322, *Gardiner v Hughes* [2017] VSCA 167), *Carlisle v Wills* [1963] VR 583; [1963] VicRp 78, *Re The Will of Littlewood (dec'd)* BC9406289 Supreme Court of Victoria, *Hill v Rowan* BC201704654 Supreme Court of Victoria). But whether labelled sufficient cause or prima facie case, the person who seeks revocation of the probate has the burden and initial onus of proof. In our jurisdiction, the person who seeks revocation of the probate has the burden and initial onus to establish sufficient cause. It was not as the Court of Appeal had it, that the first respondent had no burden and initial onus to establish sufficient cause. The trial court was absolutely right that the first respondent had the 'legal and evidential burden of proof', and that the appellants had no 'evidential burden' unless 'a prima facie case (had been) made out on the pleaded cause of action'.

[21] In the instant case, forgery was pleaded as the sufficient cause. Due execution was not in issue. The trial court held that forgery was not established.

The Court of Appeal did not disturb the finding that forgery was not proved. Since sufficient cause was not established, the Court of Appeal could not revoke the probate. But before we put that right, we would answer the leave questions in the following terms:

> Leave question 1: Whether the probate rule that the burden of proving that the instrument so propounded is the last Will and Testament of the testator applies in a case where the impugned Will has already been admitted into probate and a sealed grant of probate issued by the High Court?
>
> Answer: 'Those who propound a will must show that the will of which probate is sought is the will of the testator ... has to prove its due execution and valid execution and if there are any suspicious circumstances ... remove them from the mind of the court ...' But where a will has been admitted to probate, the person who seeks revocation of the probate has to establish sufficient cause.
>
> Question 2: where the challenge to the impugned Will is on grounds of forgery, and specifically that the executor had forged the Will, whether the burden lies entirely on the challenger in proving forgery?
>
> Answer: Where the will has been admitted to probate, the person who seeks revocation of the probate on the ground of forgery has the burden and initial onus to prove forgery. Where the will has not been admitted to probate, it would appear from all cases decided that both propounder and challenger could not be absolutely freed from the burden and or onus of proof.

[22] Those were the reasons why we unanimously allowed the appeal with costs, and restored the order of the trial court.

Appeal allowed.

Reported by Afiq Mohamad Noor